

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JUSTIN OLIVER KYSER,
Appellant.

No. 2 CA-CR 2013-0133
Filed April 10, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20112904001

The Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Nicole Farnum, Phoenix
Counsel for Appellant

STATE v. KYSER
Decision of the Court

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer¹ concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, Justin Kyser was convicted of manslaughter, aggravated assault causing serious physical injury, aggravated assault using a deadly weapon/dangerous instrument, and two counts of aggravated driving under the influence. On appeal, he argues the trial court erred by reinstating after the close of evidence the aggravated assault charges, which had been dismissed shortly before the jury was impaneled. The state concedes error. Because we conclude the court erred in reinstating the aggravated assault charges, we vacate those convictions and sentences, but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. See *State v. Martin*, 225 Ariz. 162, ¶ 2, 235 P.3d 1045, 1046 (App. 2010). In August 2011, Kyser, while driving under the influence of alcohol, codeine, morphine, and alprazolam, crossed into the wrong lane and crashed into another vehicle. The driver of the other vehicle, R.H., suffered injuries to his head, ribs, lungs, and arm, and subsequently was hospitalized and treated. He died due to complications from the injuries he sustained in the accident.

¶3 Kyser was convicted as detailed above and sentenced to concurrent terms of imprisonment, the longest of which was

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

STATE v. KYSER
Decision of the Court

fourteen years, followed by ten years of probation. We have jurisdiction over Kyser's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Reinstatement of Dismissed Counts

¶4 Kyser argues the trial court erred in reinstating, after the close of evidence, the aggravated assault counts it previously had dismissed. He reasons that, under the Arizona Rules of Criminal Procedure, once a charge is dismissed the only way to revive it is for the prosecutor to commence another prosecution by filing a complaint or seeking an indictment from a grand jury. The state agrees and concedes error.

¶5 The interpretation of procedural rules is an issue of law we review de novo, using principles of statutory construction. *State v. Campoy*, 220 Ariz. 539, ¶ 11, 207 P.3d 792, 797 (App. 2009). The plain language of a rule is the "best indicator" of the supreme court's intent in promulgating it; consequently, "[i]f the language is clear and unambiguous, we give effect to that language and do not employ other methods of . . . construction." *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). Because Kyser objected below, we review whether any error was harmless beyond a reasonable doubt. *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009).

¶6 Pursuant to Rule 16.6(a), Ariz. R. Crim. P., the court may dismiss a prosecution at the prosecutor's request "at any time," provided the prosecutor has shown "good cause therefor" and that "the purpose of the dismissal is not to avoid the provisions of Rule 8[, Ariz. R. Crim. P.]" Under Rule 16.6(d), the presumptive effect of the dismissal of a prosecution "shall be without prejudice to the commencement of another prosecution." Pursuant to Rule 2.2, Ariz. R. Crim. P., the only way to commence a felony prosecution is either "[b]y indictment" or "[b]y the filing of a complaint." Thus, under the plain language of the rules, once the state has moved to dismiss a count and that motion is granted, the only way it may commence proceedings again is to seek an indictment from a grand jury or to file a complaint. See *Godoy v. Hantman*, 205 Ariz. 104, ¶ 8, 67 P.3d 700, 702 (2003) ("The State could again initiate criminal proceedings

STATE v. KYSER
Decision of the Court

against [defendant] following the dismissal only by either obtaining a new indictment or filing a complaint.”).

¶7 Here, the prosecutor moved to dismiss the aggravated assault counts shortly before the jury was impaneled and sworn, and the trial court granted the motion. Trial proceeded on the remaining counts. After the close of evidence, however, the prosecutor moved to reinstate the dismissed counts, and the court granted the motion. As discussed above, the procedural rules did not permit the prosecutor to move to reinstate counts that already had been dismissed. She could only prosecute those counts again by filing a complaint or seeking an indictment from a grand jury. *See* Ariz. R. Crim. P. 2.2; *Godoy*, 205 Ariz. 104, ¶ 8, 67 P.3d at 702. Accordingly the trial court erred in granting the prosecutor’s motion. The error was not harmless, as the state concedes, because it resulted in two additional felony convictions for Kyser.²

Disposition

¶8 For the foregoing reasons, we vacate Kyser’s two aggravated assault convictions and sentences, but otherwise affirm.³

²To the extent the new charges were not lesser-included offenses of manslaughter, we also note that Kyser was prejudiced by the late reinstatement of the charges; his counsel’s “opening statement, his cross-examination of the state’s witnesses, his presentation of his client’s case, and all other efforts” could not have been “targeted at the elements contained in the charged offense.” *State v. Sanders*, 205 Ariz. 208, ¶ 23, 68 P.3d 434, 441 (App. 2003), *overruled on other grounds by State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009); *see also Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1989) (“[A] fair trial is ‘one in which evidence subject to *adversarial testing* is presented to an impartial tribunal *for resolution of issues defined in advance of the proceeding.*’”), quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (emphasis in *Sheppard*).

³Because Kyser’s other argument on appeal dealt only with one of the convictions we are vacating, we need not consider it.